Chapter Four: Criminal Justice without Blame

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Often we are unsure how to make appraisals about the appropriateness of blame. It is hard to be confident about whether blame is “justified.” The question put this way—“Am I justified in blaming?”—is easily confusing. In Chapter Three we saw that the norms governing the practice of blame are not moral imperatives. The relevant evaluation, an evaluation about whether and how to blame, is not determined solely by the moral facts about the offender’s moral flaws, the likelihood of her future wrongdoing, or the requirements of morally healthy relationships. The morally relevant facts do not require any particular response to wrongdoing. There is room to negotiate blame, morally speaking, or to opt for a nonblaming response that can also acknowledge the moral significance of wrongdoing. An appropriate moral response is a function of a reasonable choice a person has, among a range of alternatives, about how to relate to another person in view of her wrongdoing. The possibility of blame points to an existential juncture in human relationships—a juncture at which we must decide whether and how to engage a wrongdoer about her wrongdoing. A range of reasonable responses to wrongdoing, each of which may have different personal and interpersonal meaning and consequences are available to morally sensitive agents. This helps to explain why confusion about whether to blame can arise.

This picture presents problems for the expressive function of a criminal justice system, when it is thought that criminal sanctions should express moral blame. As I am presenting it, the question of whether to blame goes beyond the question of whether a
wrong was done. Chapter Three showed that the question of how and whether to blame a wrongdoer is a further question—an open question—even once the question of wrongdoing has been settled. Whether someone who takes my stuff is or is not to blame for her wrongful act will depend what motivated her and why. We do not, generally speaking, need to know an agent’s motives in order to determine that the sort of thing she did was morally wrong. But when we decide whether or how to blame her for her wrongful act, we must consider her reasons for acting as she did. As we will see, this moral focus on motives is a problem for the law.

The deeper problem, however, stems from the non-imperatival nature of blame. The question of blame goes beyond the matter of whether significant moral faults lie behind an agent’s wrongdoing. As I have argued, when it comes to blame, at issue is not merely whether a wrong was done or how it was caused but how we ought to regard and respond to the wrongdoer in view of her wrongdoing. We want to know what her moral faults, as her wrongdoing reveals them, say about how it is possible and reasonable to relate to her, in view of those faults. In its most familiar form, blame is premised on the notion that there is some response the wrongdoer deserves, but we have seen that this view is too rigid. There is no particular response a wrongdoer deserves. There is typically a range of reasonable responses available, each of which positions the respondent differently vis-à-vis the wrongdoer. The moral choice about which position to adopt implicates the responder in ways that are morally significant but not morally required. The morally significant and optional nature of the possibilities open to us implies that our institutions should not be in the business of blame.
The Irrelevance of Motive

American criminal legal practices are bound up with judgments of moral culpability. In our criminal justice system, we do not simply judge acts for their legality or illegality; we condemn people morally for what they have done. At least this is the public narrative surrounding our punishment practices, a narrative promoted by prosecutors, legislators, political commentators, court TV sermonizing, featured profiles of convicted felons, heated talk radio discussions, and cathartic blogging. Through these and other channels we are exposed to, and perhaps participate in, public proclamations about the repudiation offenders morally deserve and the justice of making offenders pay for their crimes. It is clear that the meaning of our criminal punishment practices depends on judgments of moral culpability and desert.

Such public expressions give voice to the intuitive moral appeal of individually and collectively rejecting behavior that violates public moral norms. Crimes violate the rights of their victims and even victimless crimes are often thought to involve significant moral transgressions. Serious crimes understandably provoke moral outrage and punishing offenders provides a public means for expressing moral judgments. It might thus seem natural for these judgments to focus on an offender’s moral culpability. By moral culpability, to be clear, I mean to refer not to a legal finding of fault, but to an offender’s moral blameworthiness.

In fact, as we saw in Chapter One, judgments of fault in criminal law are significantly detached from judgments of moral culpability. Breaking the law—the relevant notion of wrongful behavior—in a criminal case supposes subjective fault. Offenders are subjectively at fault when they commit a crime with purpose, knowledge, recklessness, or
negligence. But these judgments of an offender’s action and mental state fall short of establishing moral culpability, or so I argued. Various factors could mitigate blame or generate skepticism about an offender’s moral culpability, despite criminal fault. In Chapter One we considered mental illness, intellectual disability, and immaturity as factors that mitigate moral blameworthiness. Chapter Two took up more general skeptical worries about judgments of moral competence. Chapter Three offered an account of blame that is less dependent than familiar accounts of blame on specifying the limits of a wrongdoer’s moral competence. In this chapter I consider two additional sources of skeptical doubt about the moral culpability of individual offenders. These further grounds for skepticism show us that even a revised account of blameworthiness will not function well as a criterion of criminal liability.

On most philosophical accounts of moral blame, motive makes a difference to culpability. When we contemplate blaming, we typically want to know why a person did what she did. Motive encompasses the reasons for which a person acts, as well as the cognitive and emotional state in which she acts. It includes a person’s aims in acting together with her reasons for adopting those aims. A person might steal because she is greedy. Someone else might do so to unsettle a sense of boredom, to express dissent, or because she is hungry. Sometimes motives are complex, and a person may have several motives for what she does. We must take on this complexity in order to assess what a person’s wrongdoing says about her. The relationship between a person and her wrongdoing is naturally viewed through an examination of her motives and the connection of her motives to her standing characteristics: her dispositions, beliefs, judgments, attitudes,

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1 These are the criteria set out in the American Law Institute’s “Model Penal Code,” and formally adopted by approximately 2/3 of all U.S. states.
behavioral patterns, personality, and character traits. We might say that an assessment of motive illuminates the relationship between action and will.

Our assessment of what wrongdoing says about a person’s will bears on the question of how ethically to respond to her wrongdoing and, in particular, whether to blame her for it. Standard accounts of blame tie wrongdoing to *ill will*, understood to include the complex of cognitive, emotive, and dispositional factors I have described. A wrongdoer is taken to be the object of blame for the ill will that motivates her wrongdoing. Specifically, wrongdoers are to blame whenever they have demonstrated disregard for other people’s moral rights or moral standing. In violating the rights or valid claims of other people, criminal wrongdoers have, through insensitivity, for example, egoistic self-concern, or animosity, disregarded or otherwise failed to be moved by relevant considerations tied to the interests or integrity of other people. On the standard picture, wrongdoers who actively seek to harm others in response to their own feelings of envy, jealousy, vulnerability, desire to dominate, and the like are blameworthy for the disregard and disdain for other people that their wrongdoing expresses, provided that there is no serious reason to doubt an offender’s responsibility for her desires, dispositions, reasoning, decisions, or actions. Of course, there is disagreement about what counts as serious reason for doubt. I take up this matter in some detail shortly. On the standard picture, considerations that break or weaken the link between wrongdoing and ill will are considerations that excuse or mitigate blame. For example, harms to others that are inadvertent, impulsive, or thoughtless are taken to be less blameworthy than deliberate, studied acts of hostility, even though the less deliberate and less overtly hostile acts also transgress moral prohibitions. Harms to others are excused
altogether when no ill will is present, or when a person lacks the capacity for rational
thought and action.

I have revised the standard picture by focusing an account of excuses on hardships. This shifts our focus away from the difficult problem of distinguishing between capacity and incapacity, since even morally competent agents can be excused for their wrongdoing under conditions of hardship. Still, the approach I have advocated directs moral attention, as does the quality of will approach, to an agent’s motives.

In American criminal law, motive is not relevant for establishing subjective fault, at least for most crimes. There are exceptions to the criminal law’s disregard for motive in assessing criminal liability. Hate crimes involve group-based hostility. Treason involves desire to assist the enemy. Various “unlawful purpose” statutes exist in some U.S. states. In most cases, however, including murder, assault, and robbery, motive is not at issue in finding criminal fault. Robin Hood is as guilty as a common thief. Homicides are catalogued by reference to finer-grades of intention than are required to establish many other crimes, but the reasons behind homicidal intent are usually immaterial to criminal guilt. Distinguishing between purpose, knowledge, recklessness, and negligence might reflect the law’s attempt to grade an offender’s ill will, and thus to reflect his or her blameworthiness, but an ethical assessment of action without reference to an agent’s motives is too coarse-grained adequately to assess blameworthiness. Intentional acts vary greatly in their moral quality depending on what motivates them. Euthanasia is not similar to a sadistic murder. And reckless behavior might reflect utter disregard for the welfare of another person, or it could reflect an understandable, if not justifiable, distraction of attention. A similar point holds across categories—reckless behavior might be pernicious
while intentional or knowledgeable wrongdoing may be, and frequently is, driven by economic need, ignorance, impulsiveness, or emotional distress, rather than by deeper hostility, aggression, hatefulness, or disregard. Considered apart from motive, a scale of knowledge and purposiveness in the case of criminal acts is an unreliable guide to blameworthiness even if, generally speaking, there is reason to suppose that immoral acts are ill motivated.

Exceptions to the irrelevance of motive in assessing criminal liability can be found in the role of motive in some defenses against criminal charges. For example, provocation—such as a state of anger or fear caused by the commission of a serious crime against a family member—can function as a mitigating circumstance that might reduce an intentional homicide to manslaughter. Motives that are evidence of mental illness can also reduce charges. Evidence of mental illness might establish that the defendant was incapable of forming the relevant intention and hence that he lacked the mental state belonging to a specific intent that is required for a certain offense, such as assault with the intent to commit rape. But these examples of the relevance of motive or its absence, while significant, are limited and specific, and they are compatible with criminal liability to lesser charges (manslaughter but not murder, assault but not assault with intent to rape), charges in which motives are irrelevant.  

It is true that motive is sometimes considered relevant to the sentencing phase of a criminal trial, although more often as an aggravating than as a mitigating consideration. Evidence of cruel or greedy motives can serve to increase the penalty, according to some sentencing guidelines. Overall, however, the legislation of mandatory sentences and other

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2 In the last section of this chapter, I return to a discussion of nominate excuses in criminal law.
restrictions on judicial discretion counter efforts to individualize sentences in response to an offender’s motives, and motive has increasingly come to be treated as irrelevant to sentencing. In principle, considerations of motive could more consistently and more deeply be brought into the sentencing phase.\(^3\) Courts might more carefully consider mitigating or aggravating factors: factors that affect moral blameworthiness and thus might be thought to affect the suitability of a particular sentence for an individual offender. This could help to address skeptical concerns that uncoupling culpability and motive threatens to undermine proof of an offender’s blameworthiness. If motive is a factor in sentencing, the skeptic might be assuaged to some extent.

I will not, however, pursue this line of reasoning, because I believe an attempt to calibrate punishment to moral blameworthiness faces a further problem, a problem I will discuss in the remainder of this chapter. This problem concerns a mismatch between criminal liability and moral blameworthiness in principle. This source of skepticism about whether criminal liability suffices for moral blameworthiness addresses the role and aims of our institutions of criminal justice. The proper role and aims of a criminal justice system do not morally license the use of criminal justice as an instrument of moral blame, or so I will argue.

**Quality of Will**

A careful examination of the relationship between ill will and the context of its formation reveals that the standard prescriptive view of how to understand and respond to

wrongdoing is too narrow. The standard “quality of will” interpretation of blame neglects the relationship between a wrongdoer’s ill will and her life circumstances, and this truncates the range of morally reasonable responses to a wrongdoer’s demonstration of ill will. The “quality of will” interpretation of blame is outlined by P. F. Strawson in his classic article, “Freedom and Resentment.” There are subtle differences between the views of those who claim to inherit Strawson’s insights, but the broadly shared premise is the notion that blame attaches moral meaning to ill will. Blame conveys the significance of ill will that others bear toward us, as displayed in their attitudes and actions. It represents, claims Strawson, “the kind of importance we attach to the attitudes and intentions towards us of those who stand in…relationships to us.” As T. M. Scanlon elaborates this idea, “A person is blameworthy…if he does something that indicates intentions or attitudes that are faulty by the standards of a relationship.” Blaming responses signify the meaning of a wrongdoer’s morally flawed behavior for relationships in which she is involved. Moral blame professes a person’s moral unreliability and hence her unsuitability for the intentions and expectations that morality requires, and it traces her unfitness for moral expectations to standing aspects of her character, dispositions, will, or personhood that are revealed in her wrongful actions and the damage they have done. It is these standing aspects that quality of will theorists believe constitute the focus of blame, which is expressed via behavioral

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8 T. M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (Cambridge, MA: Harvard Univ. Press, 2010), 128-9
adjustments the blamer makes to reflect the significance of these flaws for recalibrating a relationship’s status quo.

An interesting aspect of Scanlon’s revision and expansion of Strawson’s focus on the “reactive attitudes” is its nonretributive character. By Strawson’s description, blame is typically expressed through a moralized set of “reactive attitudes”: resentment, indignation, and a desire to inflict harm on the blameworthy agent. Strawson’s characterization of the reactive attitudes has a distinctively retributive flavor, but analytical accounts of blame need not understand blaming responses to be retributive. Blame need not be limited to those persons who deserve it, in a retributive sense, nor need blame be conceived as a kind of retributive hurting. Broadening the focus of Strawson’s analysis, moral blame might include a wider range of negative reactions: anger, resentment, disappointment, sadness, regret, grief, and a disposition to renegotiate, restrict or to break off a relationship, or to demand an explanation or apology. As Scanlon argues, these responses, or some of them, can be deserved when a person’s judgments or attitudes interfere with her reliable prospects for acting in conformity with morality, but not because we think a person deserves to suffer on account of her wrongdoing. Rather, they are appropriate or fitting acknowledgements of the damage the wrongdoer has done to relationships in which she is involved.9 This wider, nonretributive class of negative reactions and the self (and other) protective behavioral changes they support can be counted as expressions of blame. But a common element in retributive and nonretributive accounts of blame is the notion that there are particular responses that a wrongdoer deserves.10 The moral evaluations, behavioral responses, and

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10 Scanlon describes his account of blame as a “desert-based” view. See *Permissibility, Meaning, Blame*, p. 188.
negative emotions that comprise blame are commonly thought to be deserved by culpable wrongdoers.

Focusing on the quality of an agent’s will supports a certain account of the limits of blame—factors that would excuse a wrongdoer from blame. As discussed in Chapter Three, the standard view is that excuses typically work in one of two ways. Either they point to the absence of ill will or they exempt the agent from responsibility by pointing to a defect in her will, what we might refer to as moral incompetence. Strawson stresses that exempting an agent from blame by pathologizing her will places her outside of the moral community. According to Strawson, while blame describes a morally engaged response to wrongdoing, excusing conditions steer us toward the objectifying and morally detached attitudes of treatment and control. This makes it sound like blame is the most humane approach. In fact, this claim about the moral engaged nature of blame is contestable. Nathaniel Hawthorne describes the stigma of moral blame in terms that are similar to Strawson’s account of the exclusionary effects of evaluations of moral incompetence. The scarlet letter stitched into the dress of Hestor Prynne, Hawthorne writes, “had the effect of a spell, taking her out of the ordinary relations with humanity and inclosing her in a sphere by herself.”11 As Hawthorne describes it, moral blame is a moralized form of social condemnation that sets the morally culpable apart, either temporarily or permanently; the moral engagement of blame belongs to a form of social control that bears a close relationship to the exercise of social exclusion.

In the previous chapter we saw that the “quality of will” paradigm is challenged by scenarios in which a member of the moral community acts wrongly and demonstrates ill will yet engages our compassion, understanding, or sympathy, at least to some extent. We saw that examples extend from the ordinary to the extraordinary: the parent under emotional strain who berates her child, the child who is mistreated by her parent and in turn bullies another child, the inmate who brutalizes another to avoid appearing weak, the soldier in a field of battle who shoots a civilian on orders from a superior, the addict who steals to support a habit, the compulsive who tells a lie, the politically oppressed person who commits a misdirected and hateful act of violence. We might include among the morally significant obstacles to acting well certain psychological obstacles—immoral desires, preoccupations, and thoughtless impulses—that are engendered by personal histories of abuse, neglect, disease, or misfortune, when such a history has damaged a person in a way that significantly affects his subsequent prospects for acting well. We might reasonably feel sympathy for individuals who encounter obstacles—present or past—to acting well and we might excuse them, in whole or in part, from blame for their morally faulty actions without finding them incapable of moral action or outside of the moral community and appropriately subject only to the detached and “objectifying” attitudes of treatment and control. The circumstances, history, and psychological vulnerabilities of these agents are at odds with the presumptions of our blaming attitudes and judgments. Yet in each of these cases the agent acts intentionally and for reasons we can criticize on moral grounds. In cases such as these, we might excuse the agent, wholly or in part, despite her ill will. Relevant factors mitigate or excuse a person’s wrongdoing by mitigating or excusing her ill will.
Consider a person with a hard life—basic needs unmet, restricted opportunities, abusive upbringing, and negative peer pressure. Suppose this person commits a violent crime. It is not unreasonable to hold that the person’s life circumstances and psychological vulnerabilities give us reason to feel compassion, understanding, empathy, or concern, even as we acknowledge that the offender committed a crime intentionally and for reasons we can criticize on moral grounds. The quality of will interpretation of blame does not help us to understand this response. To make sense of it, we need to look more broadly at the context within which the person’s intentions and attitudes were formed. We must consider a person’s ill will in relation to her circumstances and life situation.

In Chapter Three I proposed that in deciding whether or not to blame, we respond not to ill will per se. Rather, we evaluate a person’s failure to negotiate motivational or cognitive obstacles to acting well. Blame signals our belief that it was reasonable to have expected the wrongdoer to overcome the obstacles she faced, in view of our awareness of the difficulty of doing so. We evaluate the meaning of her ill will, not just by judging whether her intentions and attitudes toward other people are open to moral criticism, but by situating her intentions and attitudes within her circumstances and the context of her life experience. This involves considering both how they arose and how difficult it would be for the agent to alter them. The consideration of context is complex. We may reasonably consider obstacles the agent faced at the time of acting. We might also acknowledge obstacles in the past that influenced the development of the agent’s attitudes and dispositions. The quality of will view can feasibly be broadened to accommodate the former: consideration of obstacles the agent faced at the time of acting. Such obstacles might be externally imposed—pressure from other people, deprivation of needed resources,
threats and sources of fear, social marginalization—or they might lie within a person’s psychology, even deeply. For example, they might include mental illness. Blame implies that the obstacles encountered—strong impulses, obsessive thoughts—were manageable threats, although the wrongdoer in fact failed to manage them well. Blame implies that it was reasonable to have expected the agent to have managed them better. People we excuse from blame, on the other hand, are people who reasonably might not have been expected to act as they morally ought to have acted, either because their agency is undermined or because the obstacles encountered were understandably, although not justifiably, mishandled. The latter judgment is compatible with the agent’s moral competence.

An appraisal of an agent’s blameworthiness draws upon a general standard. It depends on a judgment about how a person who is, generally speaking, a suitable candidate for moral expectations would likely have responded to obstacles the wrongdoer encountered. The presence of obstacles mitigates blame in the sense that their presence gives us reason to view the wrongdoer’s disposition to act badly as having been relatively weaker than the disposition of the wrongdoer who did not face such obstacles. The will of the person who did wrong without recognizable and understandable incentives to wrongdoing is open to stronger moral criticism than the person whose wrongdoing was prompted by significant obstacles to acting well, incentives to wrongdoing that would be difficult for many people to resist. The crucial point here is that her faulty attitudes and intentions are viewed in relation to the difficulties she faced; faulty attitudes may not imply

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12 For an illumination and development of discussion of this point, see Christopher Lewis, “Inequality, Incentives, Blameworthiness, and Crime,” unpublished manuscript. I am grateful to Christopher Lewis for very helpful discussion.
defective agency. We have the moral option to de-pathologize her morally faulty attitudes by considering them in relation to hardships.

Past obstacles to the formation of moral dispositions, by contrast, are quite difficult for a theory of blameworthy agency to accommodate, on a quality of will approach. A person’s past experiences and genetic qualities may have led to the formation of morally criticizable attitudes and dispositions, attitudes and dispositions whose strength is not cast into doubt by the presence of incentives and pressures to do wrong at the time the agent acted. Obstacles to healthy moral development may affect what a person is like, causing objectionable attitudes and dispositions to become characteristic of the person. As a result, causes of wrongdoing may be deeply rooted in the agent. This indicates blameworthiness, on a quality of will view, since a person’s wrongdoing reflects what the person’s beliefs and attitudes are really like. But it seems to me that we might not rest easy with a judgment of blameworthiness or the blaming that this assessment seems to render appropriate. Understanding the causes of an agent’s attitudes and dispositions can shift our moral perspective—engaging our compassion by highlighting weaknesses we share, namely, our common human vulnerability to mistreatment and misfortune, and this can unsettle blaming responses. In particular, I submit, it is unsettling to our sense that a wrongdoer deserves to be harmed or scorned. It is hard to believe a person could deserve to suffer harm for behavior caused by factors that would lead many or most people to falter morally.

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13 T. M. Scanlon takes this position. See Permissibility, Meaning, Blame, p. 188.
Furthermore, even if we reject the retributive ideal, compassion and understanding for a person in view of the causes of his or her moral flaws might still affect our tendency to blame: while not disabling anger, disappointment, distrust, disrespect, and even resentment or indignation, it might well make engaging in moralized responses painful by undercutting a blamer’s inclination to experience a sense of moral righteousness. More radically, it might interfere with the judgment that it is the wrongdoer’s faulty agency that is “the cause” of moral disruptions to her relationships with other people. We might take a broader view of the causes of her wrongdoing. As a result, we might cease to endorse the relevance of blame. Instead we might view her agency as itself an ongoing form of engagement with a larger set of circumstances: we place her faulty attitudes among certain other causes that interest us morally and bear on the sort of future relationship with the wrongdoer we find morally possible and compelling. In particular, causes we view as hardships may soften our reactions, rendering us understandably more compassionate toward the wrongdoer. Repositioning ourselves accordingly in relation to the wrongdoer might be to accept fate or to make strategic efforts to avoid certain aggravating circumstances rather than to hold the wrongdoer fully accountable.

I have proposed that excuses should be understood to express a judgment about what it is reasonable to expect in view of the difficulty many people would face in overcoming the influence of obstacles to the formation of good will, obstacles the agent actually faced. Subjection to stress, violence, abuse, subordination, addiction, deprivation, and illness may contribute to the formation of ill will in ways that are particularly difficult to resist. Grappling with these problems can present serious difficulties to the potentially virtuous and nonvirtuous alike, difficulties that interfere with the possibility of moral
motivation, judgment, and action although, of course, they do not always have that result. Some people maintain moral integrity under even extremely unfavorable conditions. This is what makes the Nelson Mandelas of the world so heroic. But for other people, probably most of us, burdensome conditions and troubling experiences are obstacles to virtue—they interfere with the full realization of a moral disposition, including moral motivation and reasonable moral judgment.\(^{15}\)

Sometimes hardships are generally disabling—they damage the agents who suffer them. When disabling hardships are recognized in accounts of moral responsibility as “exempting” damaged agents from moral responsibility, it is typically the disability or incapacity rather than the hardship that is regarded as the excusing condition. “Insanity” is the paradigm exemption in law. But to focus primarily on insanity and other pervasive forms of mental dysfunction distorts our understanding of morally excusing and mitigating conditions. My focus is on the hardship, whether or not it disables the agent. The hardships of subjection to violence, abuse, oppression, illness, or poverty may provoke morally troubling reactions from people who are not generally morally disabled. Hardships may be a cause of intense anger and resentment, hostility, suspicion and distrust, lack of empathy, self-deception or other forms of dishonesty, and the impulse to engage in violent or abusive

\(^{15}\) It is true that privilege and receiving unjust benefits can also distort moral motivation and judgments. But “obstacles” such as these tend not to be counted as excusing conditions. They do not represent represent hardships and do not seem particularly difficult to overcome. This could be an illusion. I shall set aside these challenging cases and will, in what follows, focus on the clearer cases of commonly recognized hardships. I note, however, one recent attempt to present affluence as a mitigating consideration: a controversial “affluenza” defense influenced the sentencing of 16 year old drunk driver Ethan Couch, who was convicted on charges of vehicular manslaughter. Couch received ten years probation instead of jail time of up to 20 years. See http://newsfeed.time.com/2013/12/12/the-affluenza-defense-judge-rules-rich-kids-rich-kid-ness-makes-him-not LIABLE-for-deadly-drunk-driving-accident/
behavior. This is a source of trouble in personal and interpersonal settings, for example, those that involve dynamics of intimacy, authority, trust, confidence and vulnerability—dynamics that characterize the setting of morality, generally speaking. Sometimes morally troubled and troubling responses lead to criminal wrongdoing. My point is this: wrongdoing sometimes describes understandable, if not justifiable, reactions to abnormal circumstances and troubling experiences. Hardships muddy the waters of blame.

What I am emphasizing is that blame highlights an agent’s failure to act well despite the factors contextualizing her ill will, and that excuses point to factors that render her failure understandable, if not reasonable. Some excusing conditions engage our compassion while sustaining a view of the wrongdoer as an agent who is reasonably subject to moral expectations. Such excusing conditions might be operative even when they do not incapacitate the excused wrongdoer. More relevant ethically is our belief that the agent faced obstacles that would be very difficult for many or most people to overcome. We need not confirm epistemic worries about a person-specific judgment of moral incompetence, nor need we insist that excusing or mitigating conditions prompt behavior that is atypical for the agent. The focus of blame and excuse, as I understand it, is an evaluation of the difficulty of morally acceptable behavior under the pressure of factors and circumstances that contextualize the agent’s failure, including the intensity of her psychological aversion to a morally justifiable course of action and the backstory of the formation of her ill will itself. This interpretation of blame tells a story that differs from the quality of will thesis, as it is ordinarily understood.

The possibilities Strawson envisages for understanding and responding to wrongdoing are too narrow. Evaluating an agent’s will in connection with its context and
causes broadens our moral options for non-blaming responses. It shows how evaluating an agent’s ill will can lead to empathy and compassion rather than blame. Through our compassion and understanding we acknowledge that moral expectations might reasonably be adjusted in view of difficulties a person faces, whether psychological or social. More radically, we could refuse to blame by suspending the agential perspective altogether and concentrating on a view of persons as part of the natural causal order. The possibility of blame is disabled when we focus on natural causes that threaten the agency of all of us. In so doing, we could decide to restrict the morally relevant sense of the possible to the actual. We would then find that the moral course of action was exceedingly difficult, perhaps impossible, for any wrongdoer. But acknowledging mitigating and excusing considerations need not involve that sort of judgment. We need not believe that to be excused a wrongdoer must have been incapable, either generally or at the time, of having acted well. Excusing a wrongdoer from blame by understanding her misdeeds or faults in relation to hardships that have shaped them is compatible with ascribing to her the capacity and, in the morally requisite sense, the freedom to have acted well.

**Rejecting Blame**

When we consider the full range of morally engaged responses that are possible when a wrongdoer has suffered hardships, not all of which express blame, we should conclude that the criminal law should not take up a blaming stance. There are morally

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16 While we cannot morally afford to occupy this perspective for long, its validity as an angle on reality cannot plausibly be denied. Through modesty about blame we can and should be sensitive to the limits of morality. See John Dewey, *Human Nature and Conduct* (New York: The Modern Library, 1922), Ch. 24. See also Barbara H. Fried, “Beyond Blame,” *Boston Review* 38 (July/August 2013), 12-18.
reasonable responses to wrongdoing that do not force us to choose between blaming and a disengaged, objectifying stance of treatment and control, the only two options presented by much of the current philosophical literature on blame and excuse. Instead of reacting with blame, persons who suffer moral wrongs sometimes might decide instead that the obstacles a wrongdoer encountered—circumstantial pressures, strong impulses, social alienation—were understandably, although not justifiably, mishandled. This response is compatible with morality, or so I am claiming. Persons who suffer moral wrongs are morally free not to blame, at least when the wrongdoer has struggled with relevant hardships, as many criminal wrongdoers have done. But if it is reasonable for victims to refrain from engaging in blame, then it is implausible to think it should be morally required for us collectively to blame an offender.

Consider the following analogy between the morality of blame and how we might think about liability in tort law. Tort law addresses disputes between private parties concerning harms and losses. On one normative understanding of tort law, a view I find appealing, the liability of a tortfeasor is a function of victims’ right to seek recourse. One party is due compensation from another party for a loss suffered only when the harmed party decides to seek compensation. Tort law aims (or should aim) to empower those who have suffered wrongful losses to seek compensation if they so choose. This “civil recourse” interpretation of tort law differs from a “corrective justice” approach that stresses the

18 Recourse is normally represented by compensatory payments, although punitive damages can be awarded in the case of intentional torts.
impersonal value of ensuring that tort victims are compensated. Corrective justice maintains that persons who have caused wrongful losses thereby have a duty to compensate their victims. On a civil recourse interpretation of tort law, by contrast, a normative claim about liability has subjective conditions. The law empowers victims to seek damages without ethically pressuring tortfeasors to offer them. Civil recourse theorists John Goldberg and Benjamin Zipursky write, “we do not conceive of the state itself as aiming for the payment of compensation by tortfeasors to victims. The normativity of liability-imposition lies in the empowerment of plaintiffs to obtain redress if they choose.” On this way of thinking, the law is not set up to track a pre-legal moral conception of corrective justice. Rather, civil recourse theory emphasizes the importance of the fact that tort victims are entitled by law to seek compensation but are not required by justice to do so. Tort law provides (or should provide) people who suffer a wrong at the hands of another party with a tool to redress that wrong. Tortfeasors are liable only when plaintiffs exercise their right to make them liable.

In parallel fashion, I am claiming that morality provides victims with a normative structure within which they might chose to express their sense of having been wronged via blame, but it does not require them to do so. The appropriateness of blame as a response to wrongdoing is a function of the wronged party’s moral entitlement—not obligation—to insist upon the reasonableness of her expectation that the wrongdoer would have acted better, despite the difficulty of doing so. The exercise of this entitlement morally shapes the

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21 Similarly, tortfeasors are not bound by justice to offer compensation.
relationship in which they stand, without being directed by moral imperatives. At a personal level—judging a wrongdoer blameworthy and engaging in blame—closes off some relationship possibilities by, for example, solidifying feelings of mistrust, diminishing interest in friendship or intimacy, and prompting feelings of anger and resentment, or a desire to meet injury with injury. The exercise of a prerogative to blame might also deepen relationships by insisting that the wrongdoer answer for her wrong by providing an account of it, a meaningful apology, the expression of good intentions going forward, and so on. Contemplating hardships that mitigate blame, on the other hand, might open up other avenues for engagement: greater psychological understanding, feelings of compassion, empathy, and the painful yet binding intimacy of confronting a moral misdeed together.

The personal dynamics of blame extend to people who do not know one another. Anger, retributive sentiments and a desire to secure an apology are common responses to wrongdoing between strangers. A desire to understand is also common, and feelings of empathy that might follow an effort to understand are natural. My point is that blame is not required when compassion is a morally reasonable option, and that this is the case more often than most blame theorists suggest. In particular, it is the case when it comes to assessing criminal behavior, since much criminal behavior is mitigated by hardship. I am arguing that recognizing the moral relevance of hardship is at odds with an obligation to blame criminals for their unlawful actions. Many moral philosophers fail to see this because their account of the ethics of blame is grounded by an imperative assessment of the moral meaning of wrongdoing: wrongdoing that is not offset by defective or disabled moral agency on the part of the wrongdoer demands blame. We should reject that view.
The position I am staking out is compatible with maintaining that there are limits to a reasonable range of moral options for responding to wrongdoing. On the one side, there could be cases in which blame is not morally permissible. An agent might be so immature or impaired, or her circumstances so disabling to moral motivation, that either agency ought not be attributed to her, or her actions, while hers, ought not to be thought to reflect her values, dispositions, motives, and characteristics, that is, what she is like. These sorts of cases might be thought to be represented, in a rough way, by the function of nominate excuses in criminal law. Nominate excuses offer grounds for limiting criminal liability by serving as a defense against criminal charges. Such excuses include insanity, immaturity, duress, necessity, and provocation. These criminal defenses represent an “objective” standard through being very strict—imposing a high bar for a defense to meet. For example, the defense of insanity requires proof that the defendant had, at the time of acting, no knowledge of the difference between right and wrong. When the relevant standard is met, defendants are not guilty of the criminal charges. Excuses as criminal defenses are seldom successful.

The focus of this chapter has been that failure to secure a nominate excuse leaves considerable latitude for contemplating excuses that are compatible with criminal wrongdoing and might reasonably trigger compassion or otherwise quell vindictive and righteous moral sentiments and dispositions. In a criminal trial, this dimension of further moral assessment is recognized by the role excusing considerations can play in the sentencing phase, after a defendant has been found guilty of criminal charges. As discussed earlier, excusing conditions might in theory mitigate the sentences of persons guilty of crimes, even if in practice they do not typically play this role. My approach has been to
consider the moral relevance of excuses in the domain of wrongdoing in which agency is not utterly dysfunctional, undeveloped, or undermined. I have argued that the moral relevance of excuses in this wider and complex domain of moral assessment depends on an important subjective element—a subjective choice about whether and how to relate to a wrongdoer, above the threshold set by something like the law’s nominate excuses or, more specifically, the moral threshold of basic responsibility those excuses represent. The subjective dimension of excusing means that blameworthiness is an inappropriate standard for criminal sentencing. An offender’s sentence should not be a function of a victim’s subjective disposition to blame, or of the state’s supposing the moral necessity of that perspective.

Above the lower limit set by nominate excuses the possibility of blame is negotiable. Available moral responses have subjective conditions, and if the subjective conditions of blame are as I construe them, collective blame cannot be morally obligatory. We are each morally entitled, within the relationships in which we stand, personal and impersonal, to decide whether and how to blame those who have done us wrong. We are similarly entitled to decide, within reasonable limits set by the acknowledgement of wrongdoing, that blaming does not fit our stance or interest within a relationship. This important domain of moral choice enables us in myriad ways either to distance ourselves from or to confront the psychological and inter-psychic dynamics of wrongdoing, something about which we can have differing interests and aptitudes without offending morality. While there are limits on what counts as a reasonable stance, that is, a stance compatible with recognizing that a moral wrong was done, within those limits lies the negotiable territory within which moral relationships take shape and evolve over time. The ethical importance of a prerogative to
blame or to excuse by engaging the wrongdoer’s psychic world with compassion and understanding is evidence for the subjective dimension of blame. Wrongdoing does not determine that, morally speaking, we must respond in one way or another. Rather, forms of moral engagement or disengagement reflect decisions about how to relate to a wrongdoer, what stance to take toward her. A range of attitudes, more or less engaged, more or less demanding, more or less angry or righteous or sympathetic or compassionate are morally permissible. The appropriateness of a response depends on whether the respondent chooses to relate to the wrongdoer as righteous judge, empathetic partner, retrained bystander, or from some other morally acceptable position.

The conditional nature of blame—the subjective aspect of a decision about whether and how to position oneself in relation to a person who has done wrong—entails that blame is a poor foundation for criminal punishment. Since the relationship between a criminal offender’s ill will and her life circumstances demands no particular moral response from other people, blame cannot be required as a matter of law or justice. While a positional or relational conception of liability is feasible in tort law, the subjective dimension of judgments of blame does not fit well with the general form of criminal law. Not only does a blaming stance fit poorly with the criteria of criminal liability, divorced as they actually are from an evaluation of motives. It also fits poorly with the public nature of criminal law: the collective nature of our obligation through law to redress violations of individual rights. In tort law redress for wrongdoing takes a private form; in criminal law redress is formulated in terms of the public’s interest and obligation. That interest and obligation is to make it clear that certain types of behavior are forbidden and intolerable, to discourage people from engaging in those types of behavior, to affirm that transgressions are wrongful, and to
redress criminal transgressions by reaffirming and protecting the standard of behavior that criminal law seeks to advance. A duty to redress criminal wrongs generalizes across the citizenry, even if it burdens the class of offenders of a crime type with punishment. Insofar as it addresses victims, it addresses them as members of class of victims and potential victims of a type of crime.\textsuperscript{22} In these respects, the criminal law enterprise is driven by the public moral importance of rights and the equal moral status of right-holders. Its basic function is to guide people’s actions, generally speaking, in a way that respects and protects rights.

There is no blaming stance we are required as citizens to take toward criminal offenders. Our collective obligation is to respond to criminal wrongdoing, not to engage or disengage moralistically with the meaning of wrongdoing for assessing a wrongdoer’s personhood.\textsuperscript{23} This is to say that criminal law is rightly act focused, rather than attitude focused. We can and should reject behavior that violates public moral norms that are legitimately codified in criminal law. We are responsible for maintaining a standard of behavior consistent with the basic rights of all individuals and with important shared interests, and our collective obligation to protect the basic rights and liberties of our fellow

\textsuperscript{22} Victor Tadros also relies on a notion of redress in developing a non-retributivist account of punishment. However, he conceives of the duty of redress as falling on individual offenders, while I am suggesting that the duty is collective. See his \textit{The Ends of Harm: The Moral Foundations of Criminal Law} (Oxford: Oxford Univ. Press, 2011), especially Ch. 12.

\textsuperscript{23} Arthur Ripstein takes a similar position. See his \textit{Equality, Responsibility, and the Law} (Cambridge: Cambridge Univ. Press, 1999). I agree with Ripstein’s emphasis on the distinction between punishment and blame. (p. 146) Where I differ is in the idea that a response to criminal wrongdoing must involve hard treatment. If it does not, Ripstein argues, the public response to the criminal wrong will function as a mere price tag. I doubt that moral condemnation of criminal acts can only be expressed via hard treatment.
citizens supports the permissibility of burdening offenders with punishment when doing so is necessary to defend our basic rights.

In Chapter Five I develop a rights-protecting justification of criminal punishment. A legitimate democratic state is bound to defend, with fair defensive measures, the equal rights of all citizens. But we do not need to blame criminal offenders or judge them to be morally blameworthy in order to take measures to defend and protect our rights against the sort of harm those offenders have done. Furthermore, the moral basis of our permission to burden offenders with punishment does not license our morally righteous condemnation of them. It is enough that we criticize, even condemn, their criminal acts. The expressive function of punishment can remain act-focused.

Doing without blame fits better with the actual basis of criminal liability in criminal law. Forgoing blame would also enable us better to reintegrate offenders into society after they serve their sentences, and to consider alternatives to incarceration when incarceration is not necessary to further the legitimate aims of criminal justice. This reorientation would, however, require a significant revision in the public moral discourse surrounding criminal convictions, a revision that is long overdue.²⁴

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